

64. Thus, KFUO's citations to California Renewals, 6 FCC Rcd 2340 (1991), recon denied, 8 FCC Rcd 4176 (1983) and CBS, Inc., 88 FCC2d 639 (1981) are inapposite. See KFUO Conclusions n. 55. Those are predesignation cases. The burden at predesignation falls on the petitioner.

65. WXBM-FM, Inc., 6 FCC Rcd 7356 (Frysiak, ALJ, 1991) ("WXBM"), a postdesignation case, is closer to being on point, since the burden in that case did fall on the licensee. See KFUO Conclusions n. 55. Yet unlike the instant case, WXBM involved a licensee which had met its burden of showing nondiscriminatory reasons for its EEO procedures; consequently, no non-discrimination (47 CFR 73.2080(a)) issue was designated for hearing. See WXBM-FM, Inc. (HDO), 6 FCC Rcd 4782 (1991). In the instant case, KFUO never met its burden of showing nondiscriminatory reasons for its practices. Thus, the burden has never shifted back to the Bureau and the NAACP.<sup>12/</sup>

66. KFUO Conclusions 99176-77 -- African Americans' Ostensible Lack of Interest in Classical Music. KFUO asserts

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<sup>12/</sup> In a footnote, KFUO expresses surprise that the HDO could hold that the criterion "classical music experience" might dissuade minorities, since KFUO's recruitment letters did not mention that requirement. KFUO Conclusions n. 55. There is no inconsistency in the HDO's position at all. When the HDO was written, the Commission did not know that KFUO actually failed to apply its supposed "classical music experience" requirement to whites. Thus, the Commission believed at the time that KFUO actually had such a requirement, and indulged a racial stereotype in assuming that African Americans wouldn't be qualified to work at the stations. Consequently, since the Commission believed that KFUO had already secretly decided that African Americans would seldom be qualified, it would not have been unusual for a suspicious classical music "requirement" to be absent from a job notice.

At trial, it emerged that the "requirement" wasn't in the job notices because there was no such requirement at all, at least for whites. KFUO simply invented the requirement as a defense to the Petition to Deny.

that its previous counsel never asserted on its behalf that "African Americans are less likely than others to have classical music experience." KFUE Conclusions n. 57. KFUE did worse -- it asserted that because African Americans supposedly are not regular listeners to KFUE-FM, it may be inferred that they are not qualified to work there. Especially when listenership to the stations was never a job requirement, such an argument could not be more racially invidious. Understandably, both KFUE and its former counsel want to separate themselves from it now. They could have done that during the 1990-1994 predesignation period. They didn't.

67. KFUE Conclusions ¶179 -- Inference of Discrimination. KFUE correctly notes that in numerous predesignation decisions, the Commission (and the D.C. Circuit, in Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994)) declined to infer discrimination from a variety of stereotyped assumptions which found their way into pleadings. The NAACP has some sympathy with this argument.<sup>13/</sup> However, at best, KFUE's argument is an argument

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<sup>13/</sup> Surely the Commission should have decided, before this case, that racial stereotypes revealed in pleadings are a good indication of discriminatory intent. The licensee is supposedly on its best behavior in its pleadings. Thus, a stereotyped statement, right up front in a pleading supported by the declaration of a principal, is a very strong indication that there is an iceberg of discrimination below the stereotyped tip.

Apparently, the Commission selected this case for trial because it believed that the totality of the circumstances -- which (unlike most of the other cases cited in KFUE's n. 58) involved possible misrepresentations and a cover-up -- compelled designation, with KFUE's stereotypes being one of several contributing factors adding to the critical mass of doubt required for designation. The NAACP agrees with KFUE that the Commission would have spoken with a more forceful voice if it had designated many of the cases cited in KFUE's n. 58 for hearing. But the Commission's voice, if not as loud as it should have been, surely was clear. The Commission has never accepted, endorsed, validated or ratified any of the stereotypes contained in any of the cases cited in KFUE's n. 58.

for the Commission rather than this Court, for KFUD is really arguing that the Commission should never have designated this case for trial. Now that KFUD's actual discriminatory practices have been fully revealed at trial, KFUD's argument against designation for hearing is moot.<sup>14/</sup>

68. In any event, at no time during the license term, or before the HDO issued, did KFUD maintain that it was relying on that line of cases to justify the renewability of the licenses notwithstanding the stereotypical statements made in its predesignation pleadings. Instead, KFUD repeatedly refused to admit the self-evident fact that racial stereotyping was embedded within its pleadings. Now, after the HDO, KFUD's position has changed to "we said it, but we didn't mean it like it sounds." It's too late for that argument. KFUD's meant its statements at the time it made them. With its licenses at stake, no wonder it wants to take its statements back.

69. KFUD Conclusions ¶¶197-200 -- Misrepresentations.

KFUD's argues that its renewal applications did not contain a misrepresentation when they said that "it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants." KFUD's argument is that this really was their "policy", and the fact that this "policy" was never implemented does not convert into a misrepresentation the claim that KFUD had a "policy." KFUD Conclusions ¶199. KFUD's argument contains the assumption that an agency would be satisfied with a regulatee's compliance if the regulatee has a "policy" to comply, but never intended to implement

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<sup>14/</sup> Furthermore, KFUD had an opportunity to file a motion for summary decision, in which it could have argued that the evidence was insufficient to go to trial. It failed to do so.

that policy. Such a contention is unworthy of debate.

70. Furthermore, KFUD has failed to note that the very next sentence in its renewal applications was "[w]e contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals." KFUD Ex. 4, Attachment 16, p. 7. KFUD hardly ever did that, as it well knew when it filed both its 1982 and 1989 renewal applications.

71. KFUD also objects that the renewal applications never referred to recruitment "for each job opening" during the license term. KFUD Conclusions ¶199, citing KFUD Ex. 4, Attachment 16, p. 7. KFUD's experienced counsel, who did not hesitate to fall back on 1970's era EEO cases in advising their client,<sup>15/</sup> should have known that the Commission has interpreted the recruitment obligations of licenses to apply for each job opening since at least 1976, when it issued Sande Broadcasting Co., 58 FCC2d 139 (1976).

72. KFUD argues further that the renewal application form must have meant to apply to a "current" snapshot in time, and not to its practices throughout the license term. KFUD Conclusions ¶200. This assumes that a regulatory agency would be satisfied if a regulatee certifies its compliance only as of the split-second that it applies for renewal of an authorization, and neither for the time during which it has held the authorization nor for the prospective term of the authorization being sought. KFUD's logic is not unlike Charlie Brown's remark to Linus that a full year's change in a person's height all occurs on one's birthday.

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<sup>15/</sup> See KFUD Findings ¶103 (discussing Franklin.)

73. In a footnote, KFUEO argues that it did not err by failing to report the Concordia arrangement. KFUEO Conclusions n. 69. KFUEO's theory is that the Commission does not require reporting of training programs. However, there is no record evidence that the Concordia arrangement -- for which those involved were employees listed as such on each Form 395 -- involved any more training than other employees received in the normal course. At trial, KFUEO introduced no evidence of any particular training regimen or curriculum for seminary students. KFUEO's 1982 Form 396 states that "[s]tation resources and/or needs are such that we are unable to institute specific programs for upgrading the skills of employees", adding that employees are encouraged to seek their own training "for time off with pay[.]" Bureau Ex. 1, p. 6. See also KFUEO's 1989 Form 396, KFUEO Ex. 4, Tab 16, p. 7 (to the same effect). Thus, KFUEO's renewal applications expressly addressed "training" but concealed any training that involved Concordia students. It follows that in suggesting that the Commission did not require information on training programs, KFUEO has missed the point: the Commission needs to know about any employment initiative whose effect was to include whites only.

74. That same footnote also contends that Form 396 did not focus primarily on fulltime employment, rendering a decision to exclude a reference to parttime persons justifiable. KFUEO Conclusions n. 69. However, there is no evidence in the record that in deciding not to reveal the Concordia program in the renewal applications, KFUEO relied at the time on any understanding it might have had that parttime employees did not matter in the Commission's opinion.

75. KFUD also contends that Form 396 "does not request" information on Lutheran or classical music requirements. KFUD Conclusions n. 69. Form 396 did not have to expressly require this information. KFUD chose, on its own, to assert on Form 396, that it did not discriminate. Thus, it was required to be fully forthcoming in disclosing and explaining any contrary requirements.

76. KFUD Conclusions ¶¶201-205 -- Salespersons with Classical Training. KFUD admits that it "is probably true" that "not every KFUD-FM sales employee had classical music experience." KFUD Conclusions ¶202.<sup>16/</sup> However, KFUD argues that this "does not change the fact that the Church sought out individuals with such experience." Id. (emphasis in original). There is no evidence that KFUD "sought out" such persons. KFUD did not show that it recruited through schools providing classical training, through classical formatted college or community stations, through any of its advertising clients, such as the Symphony, which would have access to persons with sales backgrounds and classical backgrounds, through other commercial classical stations, or even through its own nationally recognized classical music consultant, Mr. Cleary. Nor did its employment ads in the trade press mention any requirement for classical music expertise. Thus, the evidence shows exactly the opposite of what KFUD now claims. KFUD recruited without regard to classical experience. It hired without regard to classical experience. There is no evidence that it even cared whether those it hired listened to KFUD-FM -- although it obviously cared a lot

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<sup>16/</sup> Actually, KFUD -- which had the burden of proof -- only proved that at most seven of its fifteen salespeople had even weak classical music backgrounds when they were hired. See NAACP Findings ¶¶261-62.

that African Americans did not listen to KFUD-FM. See Opposition to Petition to Deny, February 26, 1990, KFUD Ex. 4, Tab 7, p. 15.

77. KFUD argues that it was inconsistent for the HDO to have criticized KFUD's failure to mention classical or Lutheran job requirements in its renewal applications, and still complain that classical "requirements" were mentioned in a predesignation pleading. KFUD Conclusions ¶¶204-205. This was not inconsistent at all. In the HDO the Commission was properly concerned that KFUD concealed its actual, but discriminatory, job requirements. And this Court should be just as concerned that KFUD's predesignation pleadings invoked a nonexistent job requirement to defend against a charge of discrimination. The fact that this nonexistent requirement, had it existed, might itself have been discriminatory only adds irony to a pitiful record.

#### **IV. REPLY TO BUREAU CONCLUSIONS OF LAW**

78. **Bureau Conclusions ¶2 -- Intentional Discrimination.** The Bureau is correct that the record contains no evidence of intentional discrimination "against any particular individual[.]" However, the record is clear that KFUD intentionally discriminated against non-Lutherans and against African Americans, as groups, through a variety of practices, including those accurately described by the Bureau. This violated 47 CFR §2080(a).

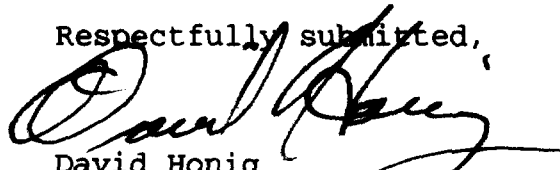
79. **Bureau Conclusions ¶5 -- Request for Relief.** The Bureau asks that "should the Presiding Judge otherwise determine that renewal of the licenses in this proceeding is in the public interest, he should require that KFUD establish a policy of non-discrimination in the hiring for non-exempt positions[.]" There is no precedent for this requested relief. Since KFUD discriminated, it is not entitled to license renewal. King's

Garden, supra. If KFUD reapplies for the licenses and is awarded them, the Commission should then condition any grant to KFUD on the type of condition recommended by and well stated in ¶5 of the Bureau's Conclusions.

**ULTIMATE REPLY CONCLUSIONS**

80. As the NAACP demonstrated in its Findings and Conclusions, KFUD misrepresented material facts and violated 47 CFR §73.2080(a), §73.2080(b) and (c). Consequently, the applications for renewals of licenses of The Lutheran Church/Missouri Synod should be denied.

Respectfully submitted,



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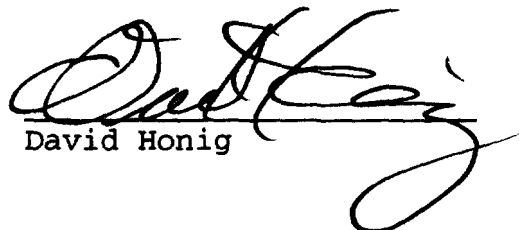
**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that I have this 31st day of October, 1994, caused a copy of the foregoing "Reply Findings of Fact and Conclusions of Law" to be delivered by U.S. First Class Mail, Postage Prepaid, to the following:

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